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No. 10-627

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED STATES and THE BAYARYN JARGALSAIKHAN, as principal resident representative to the United Nations of the Mongolian People's Republic,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

There is nothing about the narrow decision below that warrants this Court's review. The Second Circuit Court of Appeals engaged in ordinary statutory construction of the terms of the Foreign Missions Act ("FMA"), 22 U.S.C. § 4301, *et seq.*, and applied this Court's precedent on preemption and retroactivity in light of the language, structure and purpose of the FMA. Accordingly, the petition for a writ of certiorari ("Petition" or "Pet.") filed by The City of New York (the "City") should be denied.

The preemption question presented by the City for resolution (Pet., pt. I, at 17) wrongly suggests that the FMA is silent on the authority of the Secretary of State (the "Secretary") to preempt local tax laws and that the Second Circuit deferred to the Secretary's determination of her own preemptive powers. In fact, the FMA is not silent and the Second Circuit did not defer to the Secretary. To the contrary, the Second Circuit, without any deference, read the section of the FMA that is expressly labeled "Preemption" as recognizing the Secretary's authority to preempt local property taxes on residential property owned by foreign missions. Thus, this case does not provide the Court with reason or opportunity to revisit the law of preemption. If this Court were to grant the Petition, the Court would, on the merits, merely need to review the Second Circuit's interpretation of the unambiguous preemption provision of the FMA.

The second issue advanced by the City for this Court's consideration (Pet., pt. II, at 26) likewise presents an ordinary question of statutory interpretation. The City attempted unsuccessfully to persuade the Second Circuit

that the term "benefit" in § 4302 of the FMA should be read, counter-intuitively, to encompass only restrictions on foreign missions, thereby excluding positive benefits for foreign missions such as property tax exemptions. The City now takes a new tack, arguing, for the first time, that the term "designated" in § 4302 should be read narrowly to exclude a tax exemption which, in the City's lexicon, would have to be "created" or "invented," not "designated." Even if the City's new argument were properly raised at this juncture -- which it is not -- the argument would be without merit. The contrived distinction between "designating" benefits and "creating" benefits, as the City would apply it in this case, is utterly arbitrary.

Tax exemptions for foreign missions in the United States are most certainly not new. There is no dispute that foreign government-owned residences for the staffs of bilateral diplomatic missions to the United States and the offices of diplomatic missions to the United Nations are exempt from local property taxes. In fact, this case began as a dispute as to whether the tax exemption that is expressly afforded to mission "premises," pursuant to the Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, and the Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, encompasses not only the offices of Respondents' U.N. missions but also the diplomatic residences in the same buildings. The Secretary's resolution of the dispute by "designating" property tax exemptions as a "benefit" that is applicable to the diplomatic residences in question plainly does not require the "creation" of a new benefit "out of whole cloth" as the City asserts.

The third question posed by the City (Pet., pt. III, at 38) suggests that the Second Circuit "depart[ed] from this Court's clear precedent" regarding retroactivity in upholding the Secretary's nullification of existing tax liens. But this question also boils down to an ordinary question of statutory interpretation: whether the Second Circuit correctly read the language, structure and purpose of the FMA as authorizing the Secretary to designate as a "benefit" an exemption from prior years' taxes. Moreover, the Second Circuit itself characterized its holding as "narrow."

Even if the Court were inclined to revisit its preemption and retroactivity jurisprudence, this is not the case in which to do so. In the FMA, Congress delegates broad discretionary authority to the Secretary in the area of foreign affairs, an area in which the federal government's supremacy over local government action is paramount. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) ("When exercising its supervisory function over foreign missions, the State Department acts at the apex of its power. Because it has been accorded express authority from Congress to act in this area, it wields the combined power of both the executive and legislative branches.").

In sum, the City has failed to advance any "compelling reasons" for this Court to review the decision below. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. The real property taxes in dispute

The Government of India owns the twenty-six story building located at 235 East 43rd Street, New York, New York. (3a).[1] The building contains the diplomatic offices of India's Permanent Mission to the United Nations (the "India Mission") and rent free residences for the diplomats and staff who serve the Mission and India's New York City consulate. (3a-4a).

Mongolia owns the six-story building at 6 East 77th Street, New York, New York. (4a). The building contains Mongolia's Permanent Mission to the United Nations (the "Mongolia Mission"), an apartment for the Ambassador, and rent free residences for other employees of the Mission. (4a).

The India Mission and the Mongolia Mission (collectively the "Missions") have long maintained that their buildings are exempt from taxation under the VCDR and the VCCR. (53a).[2] Even though housing the Missions'

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1. Reference is to the Appendix to the City's Petition.

2. This Court previously resolved a threshold jurisdictional issue when Respondents argued that the City's case should be dismissed under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* The Court held that the district court had subject matter jurisdiction under the FSIA exception from immunity for cases involving "rights in immovable property." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007). The merits of the City's tax claim, including whether Respondents' Missions are exempt from taxation, remained to be resolved after remand.

staffs in immediate proximity to the Missions' offices is integral to the way the Missions function (54a-55a), the City maintains that only the portions of the buildings occupied by the diplomatic offices of the Missions are exempt from real property taxes. (4a). The City claims that the Governments of India and Mongolia owe the City taxes and interest (at an annual rate of 18%) which, when the district court entered judgment in March 2008, already totaled over $42 million and $4 million, respectively. (75a).

2. The FMA

In 1982, Congress enacted the FMA "to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions" and "to assist in obtaining appropriate benefits, privileges, and immunities for [foreign] missions." 22 U.S.C. § 4301(b). The FMA grants the Secretary broad discretion in carrying out Congress's mandate. The FMA authorizes the Secretary, *inter alia*, to "[p]rovide or assist in the provision of *benefits* for or on behalf of a foreign mission" and to "[p]erform such other functions as the Secretary may determine [are] necessary in furtherance of the policy of this chapter." *Id.* § 4303(2), (5) (emphasis added). The statute defines "benefit" expansively to include various enumerated categories of benefits as well as "such other benefits as the Secretary may designate." *Id.* § 4302(a)(1). The statute commits "[d]eterminations with respect to the meaning and applicability" of the statutory terms -- including "benefit" -- "to the discretion of the Secretary." *Id.* § 4302(b). The FMA further provides that "[e]xcept as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary." *Id.* § 4308(g).

3. The Secretary's July 2, 2009 Notice

On July 2, 2009, pursuant to her broad authority under and in furtherance of the stated policy goals of the FMA, the Secretary issued a notice ("Notice") "designat[ing] exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations . . . as a benefit for purposes of the [FMA]." *Designation and Determination under the Foreign Missions Act*, 74 Fed. Reg. 31788 (July 2, 2009). In taking this action, the Secretary observed that immunity for mission-owned staff housing was "in accord with the tax treatment of foreign government-owned property in the United States used as residences for staff of bilateral diplomatic missions . . . and conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing." *Id.*

As the Notice further explains, the Secretary determined that her action was

> necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties.

Id. The Secretary identified the dispute as "a major irritant in the United States' bilateral relations" that "threatens to cost the United States hundreds of millions of dollars in reciprocal taxation." *Id.*

The real property exemption designated by the Secretary applies, by its terms, to "taxes that have been or will be assessed" on the subject properties and operated "to nullify any existing tax liens." *Id.* The exemption specifically did not "require refund of any taxes previously paid by any foreign government regarding such property." *Id.*

B. The Decision Below

The Secretary issued the Notice shortly before this case was scheduled for argument before the Second Circuit, and the Department of Justice filed an *amicus curiae* brief to bring the Notice to the court's attention. The City submitted supplemental briefing challenging the Secretary's authority to issue the Notice; the Department of Justice and Respondents then filed briefs responding to the City. Following extensive oral argument, the Second Circuit engaged in a thorough analysis of the issues -- each step of which hinged on the statutory text, purpose and history of the FMA -- and determined that the Notice was a lawful exercise of the Secretary's discretion under the FMA.

1. The scope of the term "benefit"

The Second Circuit first addressed the City's argument that a tax exemption could not be a "benefit" under the FMA because Congress intended the Secretary to use the FMA's "benefits" provisions only "for the purpose of imposing reciprocal *restrictions*, and not for the purpose of 'award[ing] favors to foreign missions by relieving them of their local law obligations.'" (21a). The court concluded, however, that "the broad and open-ended language" of the statutory definition of "benefit," as well as

the other statutory provisions describing the Secretary's power to grant benefits, cannot be reconciled with the City's "technical, narrow, and somewhat counter-intuitive" interpretation of "benefit." (20a-26a).

The court below also pointed out that the FMA's legislative history did not support the City's contention "that Congress intended to establish a limited and technical meaning of 'benefit' that the Notice in this case contravened." (27a). Evidence "that Congress passed the FMA in part to create a reciprocal-sanctions regime" was not, in the court's view, "proof that Congress intended to limit the State Department's authority to designate benefits to this function only." (29a). The Second Circuit found "no evidence that Congress sought to proscribe the State Department from using benefits as 'carrots' rather than as 'sticks' in instances where the State Department believed that doing so would best advance the national interest and improve treatment for United States missions abroad." (*Id.*) The court observed that

> in the context of a statute in which Congress has "expressed a clear intention that the executive branch's authority . . . be broad," and in which Congress gave interpretive authority to the State Department to "avoid conflicting interpretations by . . . courts," it would be improper to read Congress's focus on the use of benefits as restrictions to exclude, implicitly, such other perfectly ordinary uses of "benefits."

(29a-30a) (citations omitted).

The Second Circuit rejected the City's reliance on the principle of *ejusdem generis* as confining the statutory

phrase "and such other benefits as the Secretary may designate," 22 U.S.C. § 4302(a)(1), to "benefits" of the types expressly enumerated in the statute. The court read the words "and such other benefits" as being "structurally separate" from the enumerated benefits, not a mere "catch-all" limited by the preceding examples. (25a-26a).

2. The Secretary's authority to preempt state tax law

The Second Circuit then considered whether the FMA afforded the Secretary authority to mandate a property tax exemption that has the effect of preempting the City's tax laws. The court acknowledged the presumption against preemption that operates when there is doubt as to whether Congress provided an agency with the authority to preempt. (35a). However, the court analyzed the FMA's statutory language, in particular the "Preemption" provision (§ 4307), and held that "[t]he language, structure, and subject matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law." (36a). The court concluded that the "State Department acted within its statutory authority in recognizing a property tax exemption as a benefit that has the effect of preempting the City's inconsistent tax laws." (33a).

The Second Circuit rejected the City's contention that § 4307 precluded preemption of local tax law:

> [S]ection 4307 cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings c[l]ause that insulates certain listed State and municipal

> powers from preemption. As such, section 4307 provides additional support for the conclusion that the State Department has the power to preempt any and all State and local laws that are not specifically protected.

(38a).

3. The Secretary's authority to confer a retroactive tax exemption

Finally, the Second Circuit considered whether Congress granted the State Department authority under the FMA to issue a Notice having a retroactive effect. Again, the Second Circuit acknowledged the general presumption against retroactivity, but, considering the statute as a whole, concluded "that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions." (52a). Citing "the FMA's substantial delegation of discretionary authority to the State Department," "the criteria guiding the Secretary's benefit determinations," and "the policies embodied in the statute," the Second Circuit read the FMA to permit the Secretary to exempt diplomatic residences from "taxes that have been . . . assessed" and to "nullify any existing liens." (62a). The court explained that "it would be anomalous to read the FMA as requiring the State Department to resolve disputes involving foreign missions through the designation of benefits, and yet to tie the Department's hands by limiting it to prospective solutions that may not address the sources of the conflicts." (62a-63a).

The Second Circuit noted that it was unlikely that the ongoing tax dispute at issue -- which had, in the words

of the Notice, become a "major irritant in the United States' bilateral relations which threaten[ed] to cost the United States hundreds of millions of dollars" -- "could be effectively resolved by . . . an exemption that was only forward-looking and that left the [Respondents] on the hook for decades of property taxes along with significant back interest payments." (63a). Given that the FMA "was intended to give the State Department flexible tools to carry out United States foreign-policy objectives," the Second Circuit read the FMA as permitting the Secretary to nullify the existing tax liens. (*Id.*)

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT APPLIED THIS COURT'S PREEMPTION PRINCIPLES.

The City and the Amici Curiae[3] argue that this Court's review is required because, in the face of "the presumption against preemption," the Second Circuit deferred improperly to the Secretary's interpretation of her powers under the FMA in deciding that she had the authority to preempt state tax law. In fact, this case offers no occasion to address the propriety of such deference because the Second Circuit did not defer to the Secretary's interpretation of her own preemptive powers. Rather, applying this Court's teaching on preemption, the Second Circuit found in the FMA a clear expression of Congress's intent to grant broad authority to the Secretary, including the power to preempt local tax laws.

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3. Reference is to the International Municipal Lawyers Association, the National League of Cities and the U.S. Conference of Mayors which filed a joint brief *amici curiae* ("AC Br.") dated Dec. 13, 2010.

Neither the City nor the Amici can identify any language in the decision below suggesting that the Second Circuit was deferring to the Secretary on the subject of preemption. To the contrary, the Second Circuit recognized that determining whether Congress had granted to the State Department the power to preempt local tax laws was "a matter of statutory interpretation." (35a). Consistent with this Court's instructions, the Second Circuit's guiding principle was the "purpose of Congress," which is "the ultimate touchstone in every preemption case." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (citations omitted). Even the City admits that the presumption against preemption is a rule of statutory construction that does not apply if traditional tools of statutory interpretation demonstrate Congress's intent to authorize preemption. (Pet. at 16-17).

In an effort to ascertain Congressional intent, the Second Circuit engaged in a painstaking analysis of the FMA's statutory text, structure, purpose and legislative history -- the very approach the City advocates. *Compare* 36a ("The language, structure, and subject-matter of the FMA all strongly indicate that Congress meant to give the State Department authority to designate benefits that might conflict with and therefore preempt State and local law.") *with* Pet. at 22 ("To determine whether Congress clearly and manifestly intended to authorize agency preemption, courts must consider the language, structure, purpose and history of the relevant federal statute."); *see also Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose."). As the Second Circuit found, in the case of the FMA, Congress plainly demonstrated intent to allow the Secretary to preempt local tax laws.

Relying on the language and structure of the FMA, the Second Circuit found that

> [b]y granting the State Department the power to implement an expansive statutory term -- 'benefit' -- and by providing the Department with significant discretionary authorities designed to achieve a foreign affairs objective, the FMA authorizes the Department to take actions that preempt conflicting State or local laws that implicate the Department's supervisory function over foreign missions.

(37a).

The Second Circuit discussed at length § 4307 of the FMA which is expressly entitled "Preemption." (*See* 33a, 37a-42a). Section 4307 provides:

> Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law or governmental authority regarding *zoning, land use, health, safety, or welfare*, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling.

22 U.S.C. § 4307 (emphasis added). The statutory text thus reflects Congress's intent to impose a limited bar on the preemption of certain state and local laws, in the areas of zoning, land use, health, safety, or welfare. Even in those specified areas, the Secretary can preempt state law provided that she is *denying* benefits. The fact that the

FMA had to spell out very precisely the particular areas in which the Secretary lacks the authority to preempt state law, clearly implies that the Secretary is otherwise empowered to preempt state law. As the Second Circuit stated: "Section 4307 cannot in its natural meaning be read as describing the FMA's full-preemptive scope, but rather as a savings c[l]ause that insulates certain listed State and municipal powers from preemption." (38a).[4]

Although the City characterizes § 4307 generally as prescribing the extent to which the Secretary may preempt "local police powers," the City acknowledges that "local taxing powers" are not mentioned. (Pet. at 32). The Amici nonetheless insist that § 4307 bars preemption where the Secretary confers benefits which conflict with "local police power" and that the power to tax is such a local police power. (AC Br. at 4-6). Hence, the Amici argue, taxation is within the areas in which preemption is barred under § 4307. There is, however, a fundamental flaw in the Amici's syllogism: § 4307 does not use the term "police power." Rather, § 4307 uses the terms "zoning, land use, health, safety, or welfare." Congress would have included taxation among the areas specified in § 4307 if preemption of taxation was to be precluded as well. The Amici's argument is thus inconsistent with the language

4. The dissenting opinion of Justice Rehnquist in *Toll v. Moreno*, 458 U.S. 1, 34-35 n.7 (1982), which the City cites (Pet. at 21), merely quoted a Senator's statement in the Congressional Record in 1945 that his Committee had deleted from proposed legislation language which exempted international organizations from State or local taxes because the Committee "felt that was wholly beyond the power of Congress." Neither the *Toll* opinion nor any authority cited by the City suggests that the Supremacy Clause does not apply to state and local tax laws.

of § 4307 and with the construction canon *expressio unius est exclusio alterius* -- the expression of certain things in a statute necessarily involves exclusion of other things not expressed.

The Second Circuit's analysis is fully consistent with *Wyeth v. Levine*, 129 S. Ct. 1187. In *Wyeth*, the Court found that because Congress had enacted a provision in the Food, Drug, and Cosmetic Act expressly preempting state laws concerning medical devices, Congress's silence as to the continued applicability of state laws concerning prescription drugs demonstrated that Congress did not intend to preempt state law failure-to-warn claims involving prescription drugs. *Id.* at 1200. The *Wyeth* Court stated that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [Food, Drug, and Cosmetic Act's] 70-year history." *Id.* Here, however, the converse is true: Congress identified specific areas in which preemption would *not* be allowed. The fact that Congress did not list taxes among the areas where there can be no preemption demonstrates that Congress intended to permit the preemption of state and local tax laws.

Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298 (1994), which the Amici rely on heavily is not on point. In *Barclays*, the Court addressed whether California's approach to calculating corporate franchise tax violated the Commerce Clause of the Constitution by preventing the Federal Government "from 'speaking with one voice' in international trade." *Id.* at 320 (citations omitted). The Court found that the absence of any Congressional action and repeated failures

of Congress to legislate in the area demonstrated that Congress had indicated implicitly that state taxation methods did not impair federal uniformity. *Id.* at 323-26. The Court made clear, however, that it was not considering what is effectively the issue in the instant case: "the scope of the [executive branch's] power to preempt state law pursuant to authority delegated by statute or a ratified treaty." *Id.* at 329.

Thus, the Second Circuit's preemption analysis was consistent with this Court's precedent, driven by the FMA's text, purpose and history as reflecting Congressional intent and not by deference to the Secretary's interpretation of her preemptive powers. Accordingly, the preemption issue is not worthy of review by this Court.

II. WHETHER THE SECRETARY'S NOTICE "CREATED" A "NEW" BENEFIT RATHER THAN "DESIGNATING" AN "EXISTING" BENEFIT DOES NOT WARRANT THIS COURT'S REVIEW.

A. The FMA Authorizes the Secretary to "Designate" Tax Exemptions as a "Benefit"

The City maintains (Pet. at 26-31) that the Secretary's discretionary authority to "designate" benefits under § 4302(a)(1) of the FMA does not encompass the Secretary's Notice, which the City characterizes as having "created" a "new benefit." In the City's view, the FMA "granted the Secretary authority to regulate foreign missions' access to otherwise available 'benefits,' not the authority to invent preemptive 'benefits' out of whole cloth." (Pet.

at 28). The City's challenge involves a straightforward matter of statutory interpretation involving no doctrinal issue warranting this Court's review. In any event, it is the City's argument that is fabricated out of whole cloth.

Section 4302(a)(1) of the FMA defines "benefit" to include seven categories of benefits which may be acquired by or for a foreign mission in the United States. 22 U.S.C. § 4302(a)(1). Section 4302(a)(1) further defines the term "benefit" to encompass "such other benefits as the Secretary may designate." *Id.* In addition, the FMA commits "[d]eterminations with respect to the meaning and applicability" of the term "benefit" "to the discretion of the Secretary." *Id.* § 4302(b). The FMA's expansive definition of the term "benefit" thus conflicts with the City's argument that the term "designate" should be defined very strictly to exclude the Notice's tax exemption.

Moreover, in light of Congress's expressed intent that the Secretary have the power to bring about reciprocity between the treatment afforded United States missions abroad and foreign missions in the United States (22 U.S.C. §§ 4301(c), 4304(b); S. Rep. No. 97-329 (Apr. 8, 1982)), Congress would not have intended to confine the Secretary to designating preexisting benefits. Indeed, the City admits that Congress intended to give the Secretary flexibility to respond in kind if foreign countries were to "impose imaginative new restrictions" on United States missions. (Pet. at 27). Given the "general practice abroad exempting government-owned property used for bilateral and multilateral diplomatic and consular mission housing" (Notice), the ability of the Secretary to designate such an exemption as a benefit under the FMA is consistent with the statute's language, purpose and Congressional intent.

The City's argument that the tax exemption at issue here was "created," not "designated," is predicated on an entirely arbitrary distinction. The City posits that the term "designate" means "to indicate, specify, or point out," not "to create, bring into being, or cause to exist." (Pet. at 27). From this starting point, the City leaps to the unjustified conclusion that the tax exemption provided for in the Notice was a "new benefit" "created" by the Secretary outside the bounds of her authority under the FMA, not an "otherwise available" benefit that could be "designated" by the Secretary pursuant to the FMA. (*Id.* at 27-28). The City's argument ignores the well established array of property tax exemptions for diplomatic missions that have long existed under international practice, as now codified in the VCDR and VCCR.

Articles 23 of the VCDR and 32 of the VCCR exempt mission (or consular) "premises" from all taxes. Although there is a dispute as to whether the diplomatic residences at issue here are within the mission "premises," the Fourth Circuit Court of Appeals held almost 30 years ago that a mission-owned apartment building used to house embassy personnel was tax exempt mission "premises" under the VCDR. *United States v. County of Arlington, Va.*, 702 F.2d 485 (4th Cir. 1983). Subsequently, the State Department embraced the Fourth Circuit's opinion. *Public Notice 975: Property Owned by Diplomatic Mission and Used to House the Staff of Those Missions is Exempt from General Property Taxes*, 51 Fed. Reg. 27303, 27304 (July 30, 1986); *see also Diplomatic Note* 06-01, at 11 (Apr. 12, 2006), *available at* http://www.state.gov/documents/organization/29922.pdf. While the Fourth Circuit's interpretation did not foreclose the City from litigating the issue here, the Notice has the effect of resolving the dispute by designating -- *i.e.*, "indicat[ing], specify[ing] or

point[ing] out" -- the tax exemption applicable to mission "premises" as a "benefit" that is also applicable to the diplomatic residences in dispute.

In any event, the City's reliance on the meaning of the term "designate" to exclude the tax exemption mandated by the Notice from the "benefits" permitted by the FMA is improper in that the argument was not raised below. Having failed to persuade the Second Circuit to adopt a counter-intuitive definition of the term "benefit" as being limited to sanctions and restrictions, the City has changed its focus to Congress's use of the word "designate." Yet, this Court does not sit to hear arguments that were not raised before or considered by the lower courts. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Okla. Tax Comm'n v. Chikasaw Nation*, 515 U.S. 450, 456-57 (1995) (declining to hear a new statutory interpretation argument raised by petitioner that was not raised below).[5]

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5. There is also no substance to the City's contention that under the canons of *noscitur a sociis* and *ejusdem generis* the mention of "such other benefits as the Secretary may designate" in § 4302(a)(1) is limited to benefits similar to those enumerated in the statute. The City fails to address the Second Circuit's determination that the "'other benefits' part of the definition for 'benefits'" was "a delegation" -- "structurally separate" from the enumerated list of benefits -- and thus not "a general term" that necessarily embraces the same object as the specific benefits identified." (26a). The Second Circuit stated that using such contract interpretation doctrine to restrict the interpretation of the term "benefit" under the FMA "would risk reading judicial limits into a term Congress seems deliberately to have sought to leave open-ended in order to give the State Department flexibility in an area where flexibility is particularly desirable." (25a).

B. The Second Circuit's Interpretation of the Foreign Missions Act Has Limited Impact

Even if the term "benefits" were not broad enough to encompass the tax exemption at issue here, the Secretary had authority to issue the Notice under the Diplomatic Relations Act ("DRA"), 22 U.S.C. § 254a, *et seq.*, which incorporated the VCDR. Pursuant to the DRA, the "President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission . . . which result in more favorable treatment or less favorable treatment than is provided under the [VCDR]." *Id.* § 254c.[6] Consequently, to the extent that there is any question as to whether the VCDR's tax exemption for mission premises extends to the residences at issue, or whether the Secretary has the power to recognize such an exemption as a "benefit" under the FMA, the President retains full authority to afford "more favorable treatment" to the missions per the DRA. Further, once the President has acted, the DRA requires that pending legal actions be dismissed. *Id.* § 254d.

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6. By executive order, the President "designate[d] and empower[ed] the Secretary of State to perform . . . the functions vested or to be vested in the President by [the] Diplomatic Relations Act." Exec. Order No. 12101, 43 Fed. Reg. 54195 (Nov. 17, 1978), *as amended by* Exec. Order No. 12608, 52 Fed. Reg. 34617 (Sept. 9, 1987).

III. THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S RETROACTIVITY PRECEDENT IN HOLDING THAT THE SECRETARY HAD THE AUTHORITY TO GRANT THE MISSIONS EXEMPTIONS WITH RESPECT TO UNPAID TAXES.

In upholding the retroactive impact of the Notice, the Second Circuit followed this Court's precedent, looking to the language, structure and legislative history of the FMA in determining that the Secretary had the authority to exempt diplomatic residences from local taxes and to nullify existing tax liens with respect to such residences. In any event, as the Second Circuit itself stated, the retroactivity decision was a "narrow" holding regarding the broad discretion that the FMA grants the Secretary in addressing U.S. relations with foreign countries and the diplomatic missions of those countries in the United States. (61a). Accordingly, this issue does not merit review by this Court.

The City argues (Pet. at 38) that the Second Circuit erred in upholding the Notice because, under *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), the court's sole inquiry here should have been whether the FMA contains an express retroactivity provision. This Court, however, has not applied such a rigid approach to retroactivity. Instead, the Court has considered multiple factors in assessing whether a statute permits retroactive application. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2193-94 (2009) (noting that retroactive effect of President's Congressionally authorized action was consistent with Congress's policy aims and would not disturb settled expectations); *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)

("[T]he judgment whether a particular statute acts retroactively 'should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'") (citation omitted); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282-83 (1994) (considering purpose of statute, fairness of retroactive application and fact that impact would fall on private, not public, parties).

Even in *Bowen*, the Court considered "the structure and language of the statute," that the statute at issue "on its face" permitted other "retroactive action," and that the legislative history did not contemplate "retroactive rulemaking." 488 U.S. at 209, 213-14. Moreover, in *Bowen*, unlike in the instant case the burden of retroactive application impacted private parties, not a municipality.[7]

As the Second Circuit recognized, this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), is particularly instructive here on the issue of retroactivity. *Altmann* concerned an exception to the FSIA which exempted from immunity "cases involving 'rights in property taken in violation of international law.'" *Id.* at 685. In determining that the exception operated retroactively, the Court "examine[d] the entire statute in light of the underlying principles governing our retroactivity jurisprudence." *Id.* at 695 n.15. The Court took account of the fact that the "principal purpose of

7. Notably, this Court subsequently characterized *Bowen* as "a paradigmatic case of retroactivity in which a federal agency sought to recoup . . . funds that had been paid to hospitals for services rendered earlier." *Landgraf*, 511 U.S. at 272. The Secretary's Notice at issue here, by contrast, expressly did "not operate to require refund of any taxes previously paid by any foreign government regarding such property." (Notice).

foreign sovereign immunity" is not to guide foreign states in "shap[ing] their conduct," but rather "reflects current political realities and relationships." *Id.* at 696.

In its decision below, the Second Circuit similarly considered the "values the presumption against retroactivity is designed to serve." (51a). The court stated that because the "State Department Notice implicates only the public rights of States and municipalities, not of private persons, . . . this is manifestly not a case where retroactive lawmaking is being used to burden an unpopular or underrepresented person, group, or entity." (52a). The Second Circuit also concluded that "the Notice does not upset expectations that were genuinely settled." *Id.* Indeed, as the court noted, "[b]oth the India Mission and the Mongolia Mission have consistently taken the position that their entire buildings, including those portions used for staff residences, are tax exempt under the VCCR and the VCDR." (53a).[8]

The Second Circuit thus assessed Congress's intent by examining the language, structure and purpose of the FMA, consistent with Supreme Court precedent. *See Altmann*, 541 U.S. at 692-96. As the court found, Congress delegated substantial discretionary authority to the State Department to enable the Secretary to carry out the FMA's diplomatic goals. (62a). The Second Circuit deemed it "unlikely" that the disagreement between the City and the Respondents "could be effectively resolved by the establishment of an exemption that was only

8. Although the court did not decide Respondents' arguments under the VCCR and VCDR, the Second Circuit did state: "[W]e do think that the Missions' arguments have considerable force." (53a).

forward-looking and that left the Missions on the hook for decades of property taxes along with significant back interest payments." (63a). The court concluded, therefore, that Congress could not have intended to compromise the Secretary's effectiveness by limiting her to prospective solutions that may not fully address the source of international conflict. *Id.* Rather, the Second Circuit determined "that the FMA gave the State Department the power to confer a retroactive tax exemption to foreign missions." (52a).[9]

In sum, the Second Circuit correctly applied this Court's precedent in determining that the FMA empowered the Secretary to issue the Notice. Reviewing the Second Circuit's self-described "narrow" holding (61a), will add nothing to the Supreme Court's body of retroactivity precedent.

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9. While the *Altmann* Court described the context of its decision as being "*sui generis*," 541 U.S. at 696, the fact is that, as in *Altmann*, the Notice is essentially a determination regarding the immunity of foreign sovereigns, rather than a change in substantive law. The Notice eliminates "a major irritant in the United States' bilateral relations" by immunizing foreign sovereigns against claims for taxes that are already owed or would otherwise be owed in the future.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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